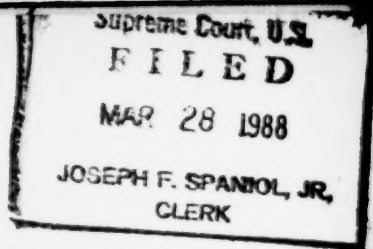


87-1606
NO. _____



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

J. O. DAVIS, Warden,

PETITIONER,

VS.

REGINALD JONES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS, ELEVENTH CIRCUIT

OF

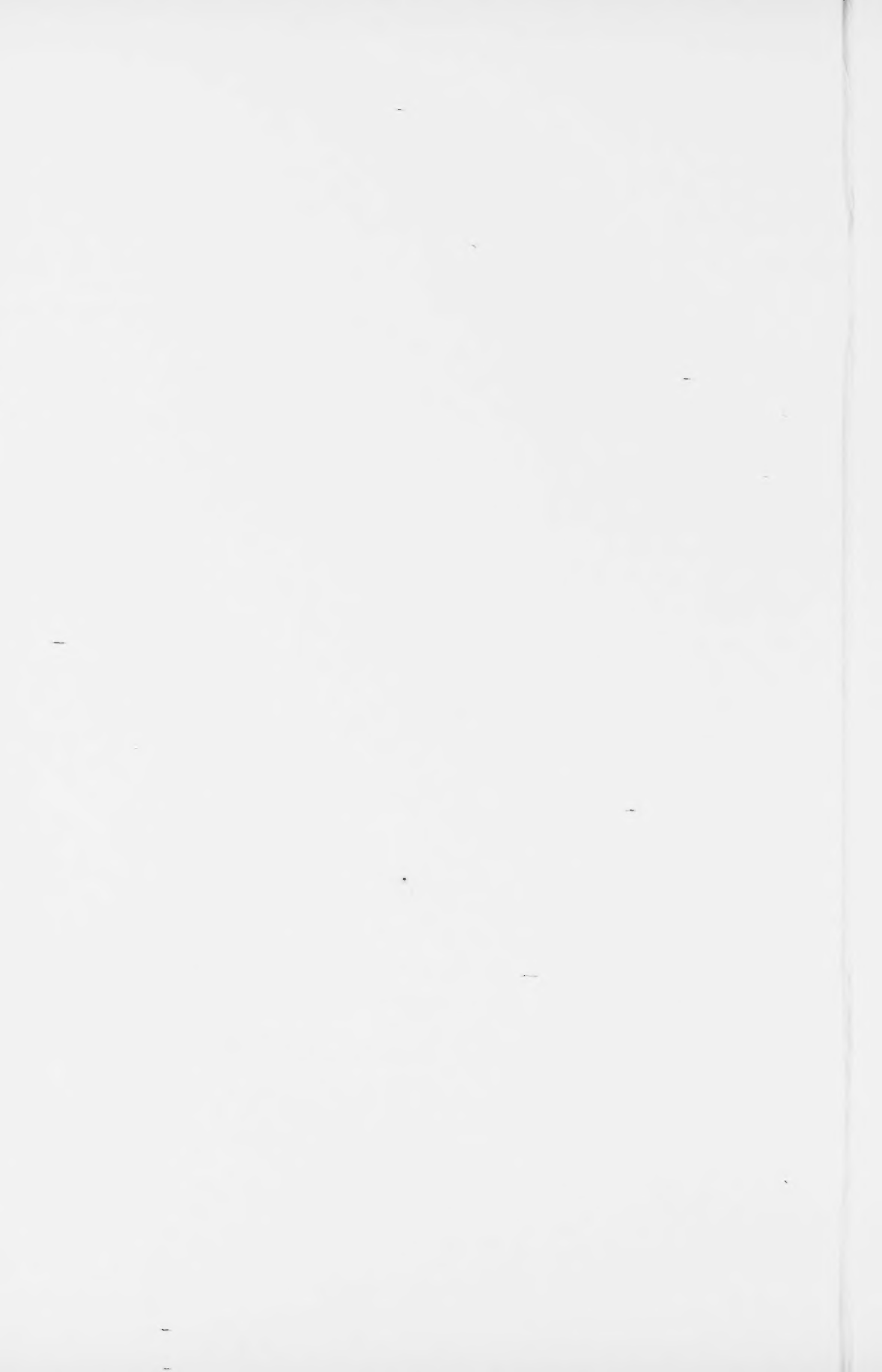
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ATTORNEYS FOR PETITIONER



QUESTION PRESENTED

Did the United States Court of Appeals, Eleventh Circuit, misconstrue the burden placed on a defendant under Swain v. Alabama to prove a prima facie case of discrimination and issue a ruling contrary to the explicit language of Swain?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals, reversing and remanding the District Court's denial of Respondent's petition for writ of habeas corpus, is reported at 835 F.2d 835 (11th Cir. 1988) and is reproduced as Appendix A.¹

2. The Order of the United States District Court for the Southern District of Alabama denying Respondent's certificate of probable cause is not reported but is reproduced as Appendix B.

3. The Order of the United States District Court for the Southern District of Alabama denying Respondent's habeas corpus petition is not reported but is reproduced as Appendix C.

¹The appendix to this petition is separately bound pursuant to Rule 21.1(k).

4. The Recommendation of the Magistrate denying Respondent's habeas corpus petition which was adopted as the opinion of the United States District Court for the Southern District of Alabama is not reported but is reproduced as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals, Eleventh Circuit, which is sought to be reviewed, was rendered on January 15, 1988. See Appendix A. Petitioner's timely Suggestion for Rehearing En Banc was denied on March 1, 1988. This petition is filed within sixty days of that denial, as permitted by Rule 20.4.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution:

"...No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

THE FACTS

At the hearing in state court on Respondent's motion for a new trial, Lee Stamp, a Mobile attorney who had practiced there for two and one-half years, testified that in his observation the District Attorney uses its peremptory challenges to strike the members of the black race, Asians, and Hispanics. (R-103-105).² Stamp recalled the names of two cases in which this had occurred. (R-105). He made mistrial motions when this occurred. Stamp had observed over twenty jury cases over that time period. (R. 106). Stamp was asked:

Q: Can you state
unequivocally and under

²The facts recited are generally taken from the opinions in the courts below, some of which are unpublished and reproduced in the Appendix. References to pages in the transcript be be begun by "R".

oath in every single one of those cases the State used every one of its peremptory strikes against black jurors or veniremen?

A: I couldn't do that.

Q: Are you aware of any systematic policy or practice of the District Attorney's office other than your own observations that there is a policy in the District Attorney's office to strike all members of the black race?

A: No. (R-106-107).

Roosevelt Simmons, a Mobile attorney with two and one-half years experience, testified he had tried an estimated twenty-five criminal cases. (R-107-108). He stated that he had objected five or six times to the use of peremptory challenges to strike blacks. (R-108). Mr. Simmons testified:

Q. Can you state under oath that in every single case you've observed the District Attorney's

office has used every
peremptory strike
available to strike off
that venire every black
jury venireman it could?

A. No, I can't
unequivocally make that
statement. (R-110-111).

Later, Simmons testified:

Q. Are you aware of any --
Do you have any actual
knowledge of any
systematic practice of
policy of the District
Attorney's office, any
articulated policy to
strike black veniremen
from every jury?

A. I don't have. (R-111).

Jeff Deen, a Mobile attorney with
six years experience, testified that at
trials in general eighty percent of the
District Attorney's strikes are members
of the black race. (R-112-113).

Major Madison, Jr., a Mobile
attorney for two and one-half years, had
tried four or five criminal cases in the
last two years. (R-118-119). Madison
testified that in the case of Curtis

Allen, a black male, the District Attorney left a black on the jury when it had enough strikes to remove him from the jury. (R-121).

Steve Orso, a Mobile attorney for two and one-half years, testified that he had tried between thirty and forty-five cases during that time. (R-122). In one or two trials there were some blacks on the jury. (R-123). In the last three out of four cases he tried, there has been one black left on the jury. (R-123).

Robert Clark, who had been a Mobile attorney for fourteen years, had defended criminals almost exclusively for the last four years. (R-125). Clark recalled five cases in which all blacks had been struck from the venire by the prosecution. (R-127).

Robert McGregor, the assistant district attorney in Petitioner's case, testified that he has tried twelve jury cases and he had not used his strikes to strike all blacks off the jury except in three cases. (R-130-131).

PROCEEDINGS BELOW

Respondent was indicted for the offense of burglary in the third degree, a violation of Section 13A-7-7, Code of Alabama 1975. (CR-1). After the jury was chosen, Respondent made a motion for a mistrial alleging that the State had used its strikes to strike all the blacks off the jury, which was then denied. (R-4). Respondent was found guilty and sentenced to life under Alabama's Habitual Felony Offender Act. (CR-21). He raised these same grounds again in his motion for a new trial. (CR-24-25). Following a hearing, that motion was also denied. (CR-26, R-101-133). Respondent's conviction was affirmed without opinion on June 17, 1984, by the Alabama Court of Criminal Appeals. Rehearing was denied without opinion in this case on August 14, 1984, and certiorari was denied without

opinion on October 19, 1984, by the Alabama Supreme Court.

On June 21, 1985, the Respondent filed in the United States District Court for the Southern District of Alabama, a petition for writ of habeas corpus, CV 85-0830-X. In that petition he challenged the state's striking of blacks from the jury in his case. On January 17, 1986, the Magistrate recommended denial of the petition. (Appendix D). Thereafter, on February 13, 1986, United States District Judge W. B. Hand issued an order denying Respondent's habeas corpus petition. (Appendix C). On February 16, 1986, the Respondent's notice of appeal, application for certificate of probable cause and motion to proceed in forma pauperis were filed with the Clerk for the Southern District. The certificate and the pauper motion were denied on

March 6, 1987, in a written opinion by Judge Hand. (Appendix B). On May 28, 1986, the certificate of probable cause and motion to proceed in forma pauperis were granted by United States Circuit Judge James Hill. Respondent's motion for appointment of counsel was denied on August 4, 1986. Subsequent to the filing of briefs in this case, counsel was appointed for Respondent and leave was given for the filing of Supplemental Briefs. Oral argument was heard in this case on April 21, 1987. On January 15, 1988, a panel of the Eleventh Circuit Court of Appeals entered an opinion reversing and remanding this case for an evidentiary hearing based on their finding that Respondent had met his initial burden under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). (Jones v. Davis, 835 F.2d 835 (11th Cir. 1988). (Appendix A). A

timely Suggestion for Rehearing En Banc
was filed by Petitioner and denied on
March 1, 1988, without opinion.

REASONS FOR GRANTING THE WRIT

The Decision Below
Misconstrues the Burden
Placed on a Defendant under
Swain v. Alabama to Prove a
Prima Facie Case of
Discrimination is Contrary
to the Explicit Language of
Swain.

In Swain v. Alabama, 380 U.S.
202, 85 S.Ct. 824, 13 L.Ed.2d 759
(1965), this Court, when addressing a
claim of systematic exclusion through
the use of peremptory strikes, held as
follows:

But when the prosecutor in a
county, in case after case,
whatever the circumstances,
whatever the crime and
whoever the defendant or the
victim may be, is
responsible for the removal
of Negroes who have been
selected as qualified jurors
by the jury commissioners
and who have survived
challenges for cause, with
the result that no Negroes
ever serve on petit juries,
the Fourteenth Amendment
claim takes on added
significance.

380 U.S. at 223 (emphasis added). This
Court went on to state:

[I]f the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.

380 U.S. at 224 (emphasis added).

The opinion of the Eleventh Circuit in the present case found, based on testimony that showed clearly that blacks had been left on juries in criminal cases tried by members of the Mobile County District Attorney's Office and by this particular assistant district attorney, that the Respondent had met his initial burden. Jones v. Davis, 835 F.2d 835 (11th Cir. 1988).

That opinion states:

At his evidentiary hearing, petitioner must prove on specific facts that [the prosecutor] had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges and that this practice continued unabated in petitioner's trial. The exclusion must have occurred

'in case after case,
whatever the circumstances,
whatever the crime and
whoever the defendant may
be.' Swain, 380 U.S. at 223
[85 S.Ct. at 837].
Petitioner is not required
to show that the prosecutor
always struck every black
venireman offered to him,
[United States v. Pearson,
448 F.2d 1207, 1217 (5th
Cir. 1981)], but the facts
must manifestly show an
intent on the part of the
prosecutor to disenfranchise
blacks traverse juries in
criminal trials in his
circuit, "to deny the Negro
the same right and
opportunity to participate
in the administration of
justice enjoyed by the white
population." Swain, 380
U.S. at 224 [85 S.Ct. at
838].

835 F.2d at 838.

The Eleventh Circuit's decision
is contrary to Swain. In so asserting
Petitioner relies, in the alternative,
on two different interpretations of the
burden Swain places on a defendant. To
reiterate, in Swain this Court stated

But when the prosecutor in a
county, in case after case,
whatever the circumstances,

whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes even serve on petit juries, the Fourteenth Amendment claims takes an added significance.

380 U.S. at 223. The obvious and most reasonable interpretation of this sweeping language is that in order to prove a prima facie case of discrimination under Swain, a defendant must show the State's striking practice in all or almost all of the criminal cases tried in a county over a substantial period of time, and not just a small sample of the cases as was done here. This is certainly consistent with the statement by this Court in Swain that

If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption [of

*nondiscrimination]
protecting the prosecutor
may well be overcome.

380 U.S. at 224 (emphasis added).

The second, and alternative, interpretation of Swain urged by Petitioner is that if Swain does not require proof of the State's practice in all of the cases tried over a period of time, it requires at a minimum that a defendant show the State's actions in a significant portion of those cases and, just as important, that in all of the cases considered the State used its strikes to eliminate all blacks from the jury. Such a showing is mandated by Swain. Under Swain the State's exclusion of blacks must be so total that the only reasonable conclusion is of an intent to preclude blacks from ever serving on juries. 380 U.S. at 224. In order to prove this, the defendant must establish the State's

practice in a large proportion of its cases. In addition, Swain must be read as requiring a showing that all blacks were eliminated by the State in all the cases considered, because proof that the State left blacks on juries when it could have struck them disproves an intent to discriminate.

The burden described in the Petitioner's second argument was also not met here. Respondent presented the testimony of six attorneys, out of an unknown number which practice in the Mobile County Circuit Court. These attorneys testified as to the specific striking results in only relatively few cases, and it cannot be established from this record what percentage of all those tried this small number represents. Moreover, the testimony of the six attorneys called by Respondent affirmatively showed that blacks were

left on juries in at least some of the cases discussed. Respondent has thus failed to meet the requirements of this second interpretation of Swain.

The difference in the Eleventh Circuit's interpretation of Swain and that of the Eighth Circuit is demonstrated by United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976). In Carter the Eighth Circuit rejected a Swain challenge which was based on the results in fifteen cases. That Court cited two reasons. First, the Eighth Circuit held that this number (actually thirteen, subtracting two involving the defendant in Carter) represented too small a sample from which to conclude that the strikes were based on race and not on reasons arising from the individual cases. 528 F.2d at 850. Second, the Eighth Circuit pointed out that in a

number of the cases cited, blacks had been left on the jury despite the availability of sufficient peremptory strikes to exclude them. Id., at 849-850.

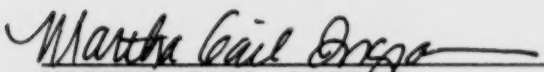
In Swain this Court placed on defendant a very heavy burden to show intentional discrimination. The Eleventh Circuit's decision in this case improperly replaces this burden with a much lighter one, which can be satisfied with testimony from only a few attorneys regarding a smattering of cases.

CONCLUSION

Because the Eleventh Circuit has misconstrued the burden on defendants under Swain v. Alabama thereby imposing a much lighter burden, the Court should certiorari in this case and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-


MARTHA GAIL INGRAM
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

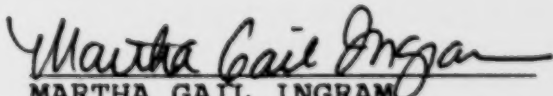
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CERTIFICATE OF SERVICE

I, Martha Gail Ingram, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 25th day of March, 1988, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable George Huddleston
Honorable Lynn E. Quinley
Huddleston, Powell And Quinley
P. O. Box 967
Daphne, Alabama 36526

I further certify I have served all parties required to be served.


MARTHA GAIL INGRAM
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

